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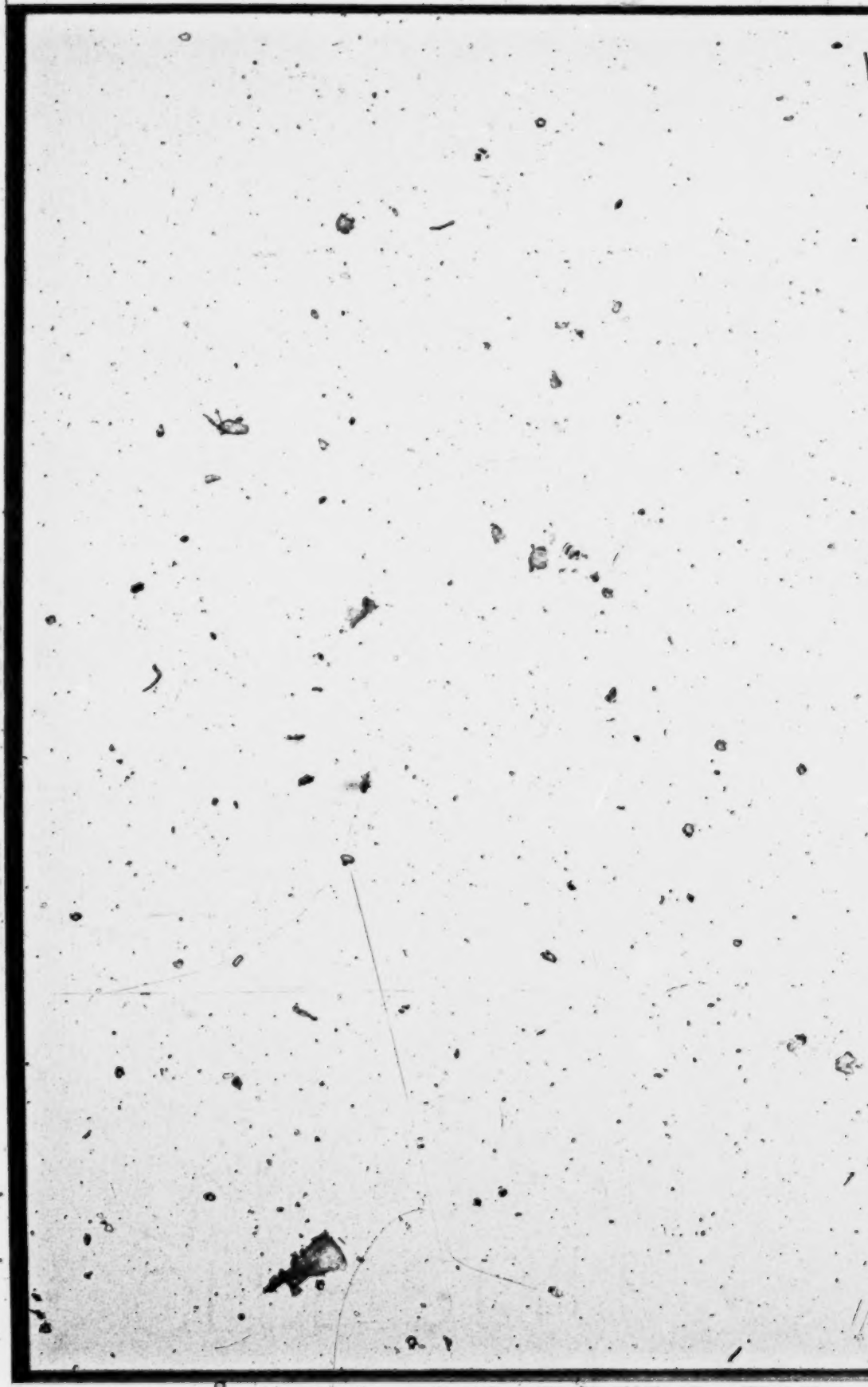

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1093

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. xviii-xix) dismiss-

ing appellants' suit to set aside the Interstate Commerce Commission's order in *Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Company Under Railroad Ownership*, 322 I.C.C. 100 (J.S. xx-xxiv).

The case is an outgrowth of a civil antitrust proceeding brought by the United States in 1940 against the Pullman Company (*United States* v. *Pullman Co.*, 50 F. Supp. 123, 53 F. Supp. 908, 64 F. Supp. 108 (E. D. Pa.), affirmed by an equally divided Court, 330 U.S. 806). In concluding that Pullman had violated Section 2 of the Sherman Act, the district court found that it had acquired a monopoly of both the manufacture and the servicing of sleeping cars, and, by its insistence on "all or nothing clauses" in its contracts with the railroads, had made it virtually impossible for anyone else to enter the business. This exclusion applied "not only to a competing concessionaire, but even to a railroad which sought to run part of its own sleeping car service and let Pullman do the rest" (64 F. Supp. at 112; see also, 50 F. Supp. at 134). The judgment required Pullman to divest itself of either its sleeping car manufacturing or its servicing business and to recognize "the right of any railroad which wishes to operate all or a portion of its own sleeping car business so to do," and directed the "elimination of exclusive dealing contracts between the Pullman Company and the railroads" (50 F. Supp. at 137).

To comply with the judgment Pullman decided to sell the servicing business to a group of 56 railroads

while retaining the manufacturing business. In approving the sale, the district court repeated that "the restrictions imposed by the [prior] judgment upon the Pullman Company are still to be effective" (64 F. Supp. at 110). Responding to the questions raised by the Order of Railway Conductors (appellant's predecessor) concerning the effect of the decree upon the rights of Pullman conductors, the district court ruled that its "order is made without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices" (64 F. Supp. at 114).

The railroads applied to the Interstate Commerce Commission for approval under Section 5(1) of the Interstate Commerce Act, 49 U.S.C. 5(1), of their plan for a pooling of the sleeping car servicing business. *Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Company Under Railroad Ownership*, 268 I.C.C. 473, 276 I.C.C. 5, 294 I.C.C. 703, 306 I.C.C. 138. The general purpose, as stated in a memorandum agreement submitted to the Commission, was to provide a means by which every railroad might:

(a) acquire all or any part of the sleeping cars regularly assigned to its lines;

(b) conduct its own sleeping car operation, in whole or in part, or arrange, through contract, on reasonable and non-discriminatory terms, for the conduct thereof by others;

(c) perform its own service or maintenance, or service and maintenance, of sleeping cars used in operations on its lines;

(d) procure such service or maintenance, or service and maintenance, through contract on reasonable and non-discriminatory terms with The Pullman Company under railroad ownership or with a service company constituted as hereinafter set forth.

The Order of Railway Conductors intervened in that proceeding, urging that employee protective conditions be imposed as a condition of the Commission's approval of the pooling plan. The Commission declined to impose such conditions. It noted that the union's "chief concern appears to be due to the possibility that a considerable number of railroads might exercise their right to perform a part of their sleeping car service * * *, [which] right was specifically safeguarded in the orders of the district court * * *" (268 I.C.C. at 491). The Commission accordingly ruled that it would not "impose a restriction upon the exercise of that right for the purpose of protecting the employment rights of Pullman employees who might be affected" (268 I.C.C. at 491-492), and approved the pooling plan as submitted. Neither the union nor any other party sought judicial review of the Commission's decision. Subsequently, the Commission approved (276 I.C.C. 5) a Uniform Service Contract, Section 2 of which specifically provided for implementation of a railroad's right to perform part of its own service [1] (J.S. xxii).

[1] "* * * In case the Railroad at any time desires to furnish part of such service in connection with its sleeping car operations, and shall request Pullman to furnish a partial form

The right was first exercised by the New York Central Railroad, which in 1959 decided to discontinue all Pullman service on its own lines. The union thereupon filed a petition with the Commission seeking a reopening of the pooling proceedings to reconsider employee protective conditions. The Commission refused, stating that its prior order "clearly contemplated that railroads may withdraw from Pullman the performance of any proposed services and themselves perform those services" (306 I.C.C. 138, 140). Again, judicial review was not sought.

In 1962, the Pennsylvania Railroad notified Pullman that it was exercising its right to request a partial form of sleeping car service. That request was implemented by a contract specifying certain services to be performed by Pullman (such as the furnishing of linens and other supplies, yard repairs, shop repairs, and interior car cleaning), and providing that all other services—including those performed by Pullman conductors—would be provided by the Pennsylvania itself. Upon the complaint of several Pullman conductors, a one-judge district court issued an order enjoining the Pennsylvania from putting its contract into effect without the approval of the Commission. But the order also provided that it would not preclude the Commission from ruling either that the contract did not violate the Commission's prior orders or

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of sleeping car service on Lines of the Railroad, Pullman shall furnish such partial service on reasonable and non-discriminatory terms; and this contract shall be subject to such modification as may, in the particular case, be necessary to provide reasonable and non-discriminatory terms therefor."

that specific Commission approval of the contract was not required.[2] *Brogan* v. *Pennsylvania R.R. Co.*, 211 F. Supp. 881 (N.D. Ill.).

Accordingly, the Pennsylvania petitioned the Commission for a declaratory order approving the contract. The union replied and requested a hearing. The Commission, following oral argument, held that the Pennsylvania's proposal to furnish part of its own sleeping car service was "fully contemplated by the terms of the pooling agreement and Uniform Service Contract approved by this Commission in the several prior reports in this proceeding" (J.S. xxiii) and that the contract between Pennsylvania and Pullman implementing that proposal did not require specific approval by the Commission under Section 5(1) of the Act (J.S. xxiv). It also denied the union's request for a hearing, explaining that the proposal would not result in any material change in circumstances affecting railroad sleeping car service and would not abridge the collective bargaining agreement between the union and Pullman.

The court below, in a 2-1 decision, sustained the Commission's order, ruling that it was consistent with the Commission's prior outstanding orders and the decree of the court in the antitrust proceeding, and that no further hearing was required (J.S. xii).

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[2] In such event the court's order would expire 20 days after the Commission acted.

ARGUMENT

The decision of the district court is clearly correct, and the appeal presents no substantial question warranting plenary consideration by this Court.

By its order, the Commission has merely reiterated its long-standing construction of the *Pullman* antitrust case and its own prior approval of the pooling agreement as conferring upon the railroads a right to perform all or part of their own sleeping-car service. Affected employees retain all their rights under the collective bargaining agreements with their respective employers, which continue in full force and operation, and any dispute concerning the application of those agreements is subject to the mandatory provisions of the Railway Labor Act, 45 U.S.C. 151-160.

1. Appellants' basic contention (J.S. 18-19) is that a railroad cannot choose to obtain only a partial service from Pullman, but must either accept all services offered by Pullman or withdraw part or all of its lines entirely from the Pullman pool. But that would be the same type of requirements contract condemned by the antitrust decree, which expressly protects the right of a railroad "to run part of its own sleeping car service and let Pullman do the rest" (64 F. Supp. at 112). The pooling agreement, drawn in strict conformity with that decree, entitles the railroad to "request Pullman to furnish a partial form of sleeping car service" (276 I.C.C. 5), and the Pennsylvania has done no more than exercise that right.

2. The Pennsylvania's decision to perform part of its own sleeping car service itself did not require the approval of the Commission under Section 5(1) of the Act. That section,[3] we stress, is grounded in concern with the anticompetitive effects which pooling agreements frequently entail. Accordingly, it prohibits common carriers from *entering* into an agreement to pool traffic, service or earnings unless the Commission finds that the agreement "will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition."

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[3] Section 5(1), 49 U.S.C. 5(1), provides:

> Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this title, it shall be unlawful for any common carrier subject to this chapter, chapter 8, or chapter 12 of this title to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: * * *

A carrier's *withdrawal* from a pooling agreement carries none of the dangers that the formation of such agreements pose. On the contrary, withdrawal of a carrier restores it as an independent competitor. That is doubtless why the statute does not require that the approval of the Commission be obtained before a carrier may withdraw. The court below properly found that the Pennsylvania's action "constituted a partial withdrawal—a withdrawal *pro tanto*—from the pooling arrangement; that it was not a new or changed arrangement for pooling, and did not require the approval of the Commission under Section 5(1) of the Act" (J.S. x).

There is no merit to appellants' contention that the Pennsylvania's action results in a new or changed pooling agreement within the meaning of Section 5(1) simply because the details of the partial service to be rendered by Pullman were embodied in a new agreement between the Pennsylvania and Pullman. Section 2 of the Uniform Service Contract, previously approved by the Commission, specifically provided for this contractual method of implementing the railroad's right to obtain a partial service from Pullman. Such a procedure is, moreover, a practical necessity in order to preserve a railroad's right to select which services it wishes to obtain from Pullman. More than 50 railroads are parties to the Pullman pooling plan, and Section 5(1) requires that all parties must assent to any new or changed pooling agreement. If a contract specifying the terms of the partial service to be rendered to an individual railroad were construed as a new pooling agreement to which the assent of all

the parties was required, the right to obtain such partial service would be severely impaired, contrary to the express provisions of the antitrust decree and the prior orders of the Commission.

3. Appellants, who represent Pullman's employees, may not be heard to urge (J.S. 18-19, 23) that a railroad's right to perform part of its own sleeping car service should be restricted by the imposition of protective conditions in favor of Pullman employees.[4] The union did not seek review of the Commission's determination in 1947 that the imposition of such conditions would constitute an improper restriction on the right of the railroads—specifically protected by the antitrust decree—to freely choose the services they would obtain from Pullman. Moreover, both the antitrust court and the Commission "left in full operation the collective bargaining agreements of Pullman," which cover "a reduction in forces or changes in working rules or conditions by Pullman, even though the reduction or changes might be related to an exercise of a railroad option to select the service to be performed by Pullman" (J.S. xii). Those collective bargaining agreements afford adequate protection to Pullman's employees and are in no way impaired by the Commission's order herein.[5]

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[4] Nevertheless, the Pennsylvania has entered into an agreement with Pullman to provide monetary protection for Pullman conductors who lose their jobs as a result of its election to perform part of its own sleeping car service (J.A. 1062-1067).

[5] Contrary to appellants' assertion (J.S. 22), the Commission did not purport to determine whether there has been a

4. The Commission did not abuse its discretion in denying appellants' request for an evidentiary hearing. Extensive hearings—in which the union participated—had been held prior to the Commission's approval of the Pullman pooling agreement in 1947. Finding that appellants had demonstrated "no material changes in circumstances affecting railroad sleeping car service," the Commission properly concluded that no "hearing for the purposes of reviewing the propriety of our continued approval of the said pooling agreement" was required (J.S. xxiii).

Appellants specified only two areas that they wished to explore in a hearing. First, they sought "to introduce in evidence * * * the collective bargaining pact between Pullman and ORC&B" (J.S. xxiii). But, as previously noted, the collective bargaining agreements are not affected by the Commission's order. Thus, the Commission was correct in observing that such "agreement is not here relevant and a hearing for its presentation in evidence herein is not necessary" (J.S. xxiv). Secondly, appellants claimed that the contract specifying the partial service to be rendered to the Pennsylvania by Pullman would result in a "redistribution" of Pullman revenues and expenses. To be sure, the contract must perforce elimi-

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violation of the collective bargaining agreement. On the contrary, it stressed that since its original approval of the pooling plan pursuant to the antitrust decree was "without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices" (268 I.C.C. at 492), its continued approval of the same pooling plan would not abridge appellants' rights under their collective bargaining contracts (J.S. xxiii-xxiv).

nate the revenue and expense connected with the services that the Pennsylvania is no longer to obtain from Pullman, but appellants did not question before the Commission that the provisions of the contract were "reasonable and non-discriminatory," as the previously approved Uniform Operating Contract requires them to be. It is thus difficult to see what remains to be considered in an evidentiary hearing on the contract. And indeed appellants have never specified any evidence that they wished to introduce, nor indicated what their suggested analysis of accounting arrangements was expected to reveal.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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